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Supreme Court, U.S.
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NO. 90-883

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

LEONARD C. JOHNSON, C.R.N.A.,
LUTHER HOSPITAL, ST. PAUL FIRE &
MARINE INSURANCE CO., AND WISCONSIN
PATIENT COMPENSATION FUND,

Petitioners,

vs.

RICKY F. RINECK, INDIVIDUALLY AND
AS SURVIVING HUSBAND OF JOY E. RINECK
AND AS GUARDIAN FOR RACHEL J. RINECK,
A MINOR,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT**

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Respondents' Brief in Opposition to the Petition for a Writ of Certiorari in this matter attempts to avoid any consideration of the merits of the constitutional question raised by first, overstating the nature of the "not pressed or passed on below" rule, and second, by mischaracterizing the issue raised in the Petition. Finally, Respondents suggest that consideration by the United States Supreme Court is unwarranted because the issue raised has "only" come before the Court three times in the last thirteen years.

I. CONSIDERATION OF THE CONSTITUTIONAL ISSUE RAISED IN THE PETITION IS NOT BARRED BY ANY JURISDICTIONAL RULE.

Respondents fully understand that there is a serious constitutional problem raised by the decision of the Wisconsin Supreme Court in this matter, and attempt to avoid this constitutional issue by changing the issue from one concerned with the merits to one concerned with procedure. *See* Respondents' *Brief in Opposition*, at i. Respondents argue that a "fatal jurisdictional defect requires the denial of certiorari in this case." *Brief in Opposition*, at 5. Respondents rather seriously overstate the case, however. The fact is, the United States Supreme Court has not decided "whether the 'not pressed or passed upon below' rule is jurisdictional . . . or prudential . . . or whether its character might be different in cases like this from its character elsewhere . . ." *Illinois v. Gates*, 462 U.S. 213, 222 (1983).

Application of any rule should take into account the purposes of the rule, and the "not pressed or passed on below" rule is no different. In *Illinois v. Gates, supra,* at 217-222, the Court discusses both the nature and purposes of the rule at some length. The fact is, consideration of the constitutional question raised by the Petition for Writ of Certiorari in this case does not contravene any of the purposes underlying the rule.

One of the purposes for the "not pressed or passed on below" rule is a concern that there be an adequate record. 462 U.S. at 221. In this case, however, Respondents concede that the material facts are undisputed. The holding of the Wisconsin Supreme Court has clearly created two separate, and unequal, classifications of wrongful death litigants, and the record is sufficient for consideration of the constitutional issue raised by this unequal classification system.

A second purpose underlying the rule is a concern for "due regard for the appropriate relationship" between the United States Supreme Court and the state courts. 462 U.S. at 221. This "due regard" requires that the state courts be given an opportunity to consider the constitutionality of the actions of state officials. However, in this case, it was the holding of the Wisconsin Supreme Court which first created the unequal classifications of litigants and *not* the conduct of any other state official. The first opportunity presented to consider the holding of the Wisconsin Supreme Court was upon a motion for reconsideration, and that opportunity was timely pursued. Moreover, the Wis-

consin Supreme Court's holding in this case is the only authority for the separate and unequal classifications, and therefore consideration of the constitutional issue by the United States Supreme Court will not imprudently impact on the stability of Wisconsin's law.

In short, neither the nature nor the purposes of the "not pressed or passed on below" rule should bar consideration of the clear-cut constitutional issue raised on the Petition for Writ of Certiorari in this case.

II. RESPONDENTS' BRIEF IN OPPOSITION MISCHARACTERIZES THE ISSUE PRESENTED.

In the Petition for Writ of Certiorari heretofore filed, Petitioners attempted to explain that, prior to the holding of the Wisconsin Supreme Court, "Petitioners had no reason to challenge the constitutionality of the 'cap' on medical malpractice damages, because Petitioners did not believe that that statute was unconstitutional." *Petition* at 25. The Petition goes on to explain that Petitioners still do not believe that the statute is unconstitutional. It is the decision of the Wisconsin Supreme Court, which effectively "turns the statute on its head," which Petitioners feel is unconstitutional. Without the decision of the Wisconsin Supreme Court, there would be only one classification of wrongful death damages, common to all Wisconsin litigants.

However, Respondents attempt to suggest that "the only real issue in this case is the construction of state statutes." *Brief in Opposition* at 5. Respondents

go on to argue that limitations on damages in medical malpractice actions (and by implication, other actions) may be rationally related to legitimate state interests, and are therefore constitutional. Respondents then suggest that, since this is so "cut and dried," there is no reason for the United States Supreme Court to review the decision of the Wisconsin Supreme Court in this case. Respondents' argument, however, seriously mischaracterizes the constitutional issue presented.

Petitioners do not challenge the authority of the Wisconsin legislature to limit damages, if such a limitation is rationally related to a legitimate state interest. That is *not* the issue presented in this case. In this case, the Wisconsin Supreme Court interpreted a statute designed to limit damages so that it, in fact, increased potential damage awards by a factor of 20. Even this would present no constitutional problems if the statute applied to all Wisconsin litigants. However, the decision of the Wisconsin Supreme Court applied the new increased damage limitation only to health care providers. Thus, the constitutional question actually presented in the Petition for Writ of Certiorari is whether or not the Wisconsin Supreme Court may impose a liability exposure of $1,000,000 in wrongful death actions against health care providers when, for all other Wisconsin litigants, the limit on liability is $50.000 for exactly the same loss.

CONCLUSION

Respondents agree with Petitioners that the appropriate standard of review in this matter would be application of the "rational basis" test. *Brief in Opposition*

at 6. Respondents further concede that the material facts in this matter are undisputed. *Brief in Opposition* at 10. The clear-cut constitutional issue presented by the Petition for Writ of Certiorari to the Wisconsin Supreme Court is whether or not the separate and unequal classifications created by the Wisconsin Supreme Court will withstand scrutiny. The fact that this case is at least the third such case to come before the United States Supreme Court in the last dozen or so years indicates that it is an ongoing, national problem.

Petitioners respectfully request that the Court grant the Petition, and issue its Writ of Certiorari to the Wisconsin Supreme Court.

Respectfully submitted this 4th day of January, 1991.

SCHELLINGER & DOYLE, S.C.

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